

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

RAYMOND N.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH Case No. 2010040145

DECISION

Mark Harman, Administrative Law Judge of the Office of Administrative Hearings, heard this matter in Whittier, California, on March 3, 2011.

Raymond N. (Claimant) was represented by his father (Father).¹

Judy Castañeda, Fair Hearing Coordinator, represented the Eastern Los Angeles Regional Center (the Service Agency).

Oral and documentary evidence was received, and the matter was submitted for decision at the conclusion of the hearing.

¹ Initials and familial titles have been used to protect the privacy of Claimant and his family.

ISSUE

Whether the Service Agency shall fund the Victory Tae Kwon Do martial arts program provided in the City of Whittier for one session per week in light of the enactment of Welfare and Institutions Code² section 4648.5.

FACTUAL FINDINGS

1. Claimant is an 11-year-old Service Agency consumer with diagnoses of Autistic Disorder and Borderline Intellectual Functioning. His parents are divorced and have joint custody. Claimant lives at home with his mother, older brother, and three younger half-siblings on his mother's side, Monday through Thursday, and most weekends with Father and two half-siblings on Father's side, Friday through Sunday. According to the most recent Individual Program Plan (IPP) documents, Claimant has adjusted well to living in two households.

2. Between June and September 2009, the Service Agency funded martial arts for ten sessions per month through "Victory Tae Kwon Do." On October 5, 2009, the Service Agency notified Father that, due to recent changes in the Lanterman Developmental Disabilities Services Act (the Lanterman Act)³ that suspended certain services, including social recreation activities, the Service Agency would not be funding "Victory Tae Kwon Do" for Claimant.⁴ Father filed a timely fair hearing request, and this proceeding ensued.

3. Claimant has many challenges, particularly an inability to focus and attend to his classroom work. He is well-behaved and well liked by peers at school, but he can interact with them only briefly. For example, he may spend 15 minutes in an activity with peers at his after school program, but then he wanders off.

4. Claimant is verbal, has good fluency, and is understood by strangers. His weak areas include his receptive language. His comprehension skills vary greatly depending on the level of support he receives from an instructional aide while taking tests. He seeks consistent

² All statutory references are to the Welfare and Institutions Code.

³ Section 4500 et seq.

⁴ The Service Agency had earlier mailed a Notice of Proposed Action (NPA) to Claimant's mother, who allowed the time to file an appeal of the Service Agency's decision to lapse, and the tae kwon do services were terminated. Father learned about this situation at an IPP meeting on October 5, 2009. Father requested that a second NPA be mailed to his home address, which initiated the present proceeding.

positive reinforcement to remain motivated. He is able to retell and paraphrase with 60 percent accuracy. He has difficulty with inferences.

5. Claimant attends a full inclusion, fifth grade general education classroom at Lake Marie Elementary School in the City of Whittier, within the South Whittier School District (District). He has academic ability but lacks focus. According to his annual academic report of June 1, 2010, he is below basic levels in most academic skills, including reading and writing. A behavior goal for 2009-2010 was for Claimant to stay on task for 15 minutes when completing a written assignment with no more than three prompts. His progress on this behavior goal has been inconsistent. At times, he was able to stay on task, and at other times he required maximum prompts. The District provides a one-to-one instructional aide to assist him to integrate in his classroom. The aide helps Claimant stay on task. It takes much encouragement for Claimant to complete simple writing tasks.

6. Not long after the Service Agency discontinued funding the tae kwon do services in 2009, the District discontinued providing Claimant with Adaptive Physical Education (APE) and Occupational Therapy (OT) at school, presumably because Claimant had met his goals. At his April 16, 2010 Individualized Educational Program (IEP) meeting, the District offered 45 minutes per month of specialized academic instruction; 30 minutes per day of intensive individual instruction with his aide; and 30 minutes per week of group speech and language therapy. Father observed that Claimant was having great difficulty with the transition to a changed routine after the APE and OT were discontinued. In April 2010, his teacher observed that Claimant was regressing both academically and behaviorally. “[He] seems to be used to others helping him out. . . . A learned helplessness.” At the beginning of the 2010-2011 school year, Claimant’s focus continued to decrease and his self-stimulating behaviors, including hand shaking and constant body movement during class time, continued to increase. Father requested an IEP meeting in November 2010 to discuss the possibility of reinstating OT⁵ and possibly the APE.

7. Claimant’s focus and attention improved “tremendously” after he began participating in the martial arts classes. His motor skills and muscle strength improved. Claimant was “very alert,” he would concentrate, and “it seemed he had a little more awareness.” He demonstrated pride in his accomplishments when he showed Father what he could do. He looked forward to going to the classes. To Father, this was not merely a social recreational activity for his son. Father saw that his son could do things “I did not know he could do,” and it helped his son to believe in himself.

⁵ Claimant has difficulties with fine motor skills. He has a hard time using food utensils, is unable to button or use zippers, and needs support to complete his dressing.

8. Claimant's family takes him to parks, restaurants, for walks, shopping, and to other activities where he can have social interactions. At Father's home, Father tries to involve Claimant in activities -- basketball, kicking a ball around, drawing -- but it is hard to keep him active. "If you leave him alone, he just sits there [and will] do nothing [but] play video games. I let him do it a little bit. . . . If it were up to him, he'd be playing video games all day." In Father's opinion, sports are an effective means for improving Claimant's attention and focus.

9. Father put Claimant in the AYSO soccer league, but his son did not show interest in the game for very long. Some teammates had severe disabilities, and Father was concerned that his son would begin to mimic their behaviors. Claimant took swimming lessons at the YMCA in Whittier. It was here that Claimant first began martial arts classes, with Father privately paying, but the YMCA discontinued the martial arts program. Father then discovered Victory Tae Kwon Do and the Service Agency began funding it.

10. At the September 2010 IPP meeting, the Service Agency agreed to fund an assessment by Creative Beginnings for Children to determine if Claimant could benefit from "Floortime" services.⁶ Floortime is a one-on-one service, usually in the home, between a therapist and Claimant (and Claimant's parents), but does not necessarily involve groups of peers. The results of the Floortime assessment were not presented at the hearing. The only other service the Service Agency currently funds is 24 hours per month of in-home respite.

11. The Victory Tae Kwon Do classes have not been shown to be necessary for Claimant to remain at home.

LEGAL CONCLUSIONS

1. In enacting the Lanterman Act, the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals, and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (§ 4501.)

2. The Lanterman Act gives regional centers, such as the Service Agency, a critical role in the coordination and delivery of services and supports for persons with disabilities. (§ 4620 et seq.) Thus, regional centers are responsible for developing and implementing

⁶ "Floortime" is a specific therapeutic technique based on the Developmental Individual Difference Relationship Model (DIR) of therapy. The premise of Floortime is that an adult can help a child expand their circles of communication by meeting them at their developmental level and building on their strengths. This therapy is often incorporated into play activities on the floor.

individual program plans, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (§§ 4646, 4646.5, 4647, and 4648.)

3. Section 4512, subdivision (b), defines the kinds of services and supports that may be funded. It sets forth a collaborative process involving the consumer (or his family) and service agency representatives for identifying the appropriate services and supports directed “toward alleviation of a developmental disability, or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.” Services and supports may include social skills training and recreation. (*Ibid.*)

4. Where a change in services is sought, the party seeking the change has the burden of proving that the change is necessary to meet the consumer’s needs or that the consumer is no longer entitled to the services. (Evid. Code, §§ 115 and 500.) The Service Agency had approved funding three months of “tae kwon do” for Claimant beginning in June 2009. Thus, the service had ended in September 2009. Therefore, Claimant has the burden of proof to show that the Service Agency should fund the Victory Tae Kwon Do services.

5. In its NPA, the Service Agency referenced section 4648.5 in support of its decision. Section 4648.5 provides:

“(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers’ authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the costs of providing the following services:

“(1) Camping services and associated travel expenses.

“(2) Social recreation activities, except for those activities vendored as community-based day programs.

“(3) Educational services for children three to 17, inclusive, years of age.

“(4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

“(b) For regional center consumers receiving services described in subdivision (a) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.

“(c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer’s developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer’s needs.”

6. When new legislation repeals or modifies statutory rights, the rights normally end or are modified unless vested pursuant to contract or common law. (*Green v. Workers’ Compensation Appeals Board* (2005) 127 Cal.App.4th 1426, 1436.) The entitlement to services and supports directed toward the alleviation of a developmental disability, including those providing social recreation activities, exists pursuant to the Lanterman Act, and the Legislature may repeal or modify the entitlement. Section 4648.5 clearly and specifically applies to social recreation activities, and a regional center’s ability to purchase these services is suspended, “notwithstanding any other provision of law,” unless an exemption is granted.

7. It is undisputed that the Victory Tae Kwon Do services are beneficial to Claimant. Claimant has particular needs for effective services and supports to address his lack of focus and ability to sustain social interaction. He also benefits from the exercise. Father has demonstrated that these services have positively impacted Claimant’s lack of sustained attention and focus, deficits which are consistent with his diagnosis of autism. The Lanterman Act sets forth broad goals for the provision of services and supports, as well as a process to achieve the stated objectives of a consumer’s IPP, which requires regional centers to “first consider services and supports in natural community, home, work and recreational settings. Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family.” (§ 4648, subd (a)(2).) Under this provision, and based on the equities of the situation, the regional center should fund the requested service. However, the enactment of 4648.5 reflects a legislative choice to discontinue funding particular kinds of services, whether they provide benefits or not, unless a narrow exception can be established by the consumer. This more stringent requirement follows the policies that have always governed certain IPP decision-making, such as the need for consumers to utilize cost-effective or generic services and supports to meet their needs for, among other examples, regular physical exercise and social recreation. The exception now governs, as the old rules have been changed.

8. The Service Agency appears willing to fund a Floortime therapy program, which will ameliorate some of Claimant’s communication and socialization deficits. Meanwhile, Father must continue to secure opportunities for social interaction in the community. Father obviously cares for his son and is actively engaged in providing the support his son needs. Generic resources are available for Claimant’s social interaction, although finding the right fit undoubtedly takes additional time and effort. At this time, it cannot be said that the Victory Tae Kwon Do services are a “primary” or “critical” means to ameliorate the physical, cognitive, or psychosocial effects of Claimant’s developmental disability; however, if no other resources are

available to meet Claimant's needs, then Father may request an IPP meeting to explore alternative services that will address his son's needs.

9. By reason of the foregoing, the Service Agency's authority to purchase Victory Tae Kwon Do services are suspended pending implementation of the Individual Choice Budget and the required certification by the Director of Developmental Services.

ORDER

Claimant's appeal is denied. The Service Agency's authority to purchase Victory Tae Kwon Do services is suspended.

Dated: May 25, 2011

Mark Harman
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.